Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.

Petitioner,

v.

GALE NORTON, Secretary, United States Department of the Interior; NU-WEST INDUSTRIES, INC., dba: Agrium Conda Phosphate Operations.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the decision of the Ninth Circuit Court of Appeals in *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (2005), rejecting application of *Bennett v. Spear*, 520 U.S. 154 (1997) to claims of inadequacy of a completed Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"), be reversed because it conflicts with:

   a. *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8 Cir. 1999); *Central So. Dakota Co-op Grazing v. Secretary, Dept. of Agriculture*, 266 F.3d 889 (8 Cir. 2001); and *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8 Cir. 2002) and/or,
   b. A correct reading of *Bennett v. Spear*, *supra*,

in order to render application of the rule of *Bennett v. Spear* uniform among the Circuits?

LIST OF PARTIES

All parties are listed in the caption. Petitioner Ashley Creek Phosphate Co., is a nongovernmental corporate party to the proceedings before the United States District Court, District of Idaho and the United States Court of Appeals for the Ninth Circuit. Ashley Creek Phosphate Co. discloses that it is a Utah corporation, without parent corporations, and that no publicly held company owns more than ten percent (10%) of Ashley Creek Phosphate Co.'s stock.

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Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). 11,12

Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8 Cir. 2002). 10

Sausalito v. O'Neill, 386 F.3d 1186 (9 Cir. 2004). 10,

. . . . . 11, 15, 16

Town of Stratford v. F.A.A., 285 F.3d 84 (D.C. Cir. 2002). 7

STATUTES

28 U.S.C. § 1254(1). 1

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28 U.S.C. § 1332. 6

28 U.S.C. § 1346. 6

28 U.S.C. § 1391. 6

5 U.S.C. § 702. 1

42 U.S.C. § 4332(2)(C)(iii). . 1, 2, 6, 8, 17, 18
(a.k.a. § 102(2)(C))

FEDERAL REGULATIONS

40 C.F.R. § 1508.4. 20

RULING BELOW

Ashley Creek Phosphate Co. v. Gale Norton, Secretary, United States Department of Interior; *Nu-West Industries, Inc., dba: Agrium Conda Phosphate Operations*, 420 F.3d 934 (9 Cir. 2005) (No. 04-35640; D.C. No. CV-03-00499-BLW).

BASIS OF JURISDICTION

Decision entered August 22, 2005; Rehearing denied October 28, 2005. 28 U.S.C. §1254(1).

STATUTES INVOLVED

Administrative Procedure Act, 5 U.S.C. §702; National Environmental Policy Act, 42 U.S.C. §4332(2)(C)(iii).

STATEMENT OF THE CASE

This is an action brought pursuant to the Administrative Procedures Act ("APA") and National Environmental Policy Act ("NEPA"), seeking review of an Environmental Impact Statement ("EIS") and the Bureau of Land Management ("BLM")'s subsequent approval of appellee Agrium's proposal to mine certain phosphate leases in the Caribou National Forest in Caribou County, Idaho.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Ashley Creek Phosphate Company, ("ACP") filed its Complaint in the United States District Court for the District of Idaho on November 11, 2003, seeking *de novo* review of the BLM's action, for refusal to consider "alternatives" to the proposal under 42 U.S.C. §4332(2)(C)(iii). (C.R. 1). On December 15, 2003, Nu-West Industries, Inc., dba Agrium ("Agrium") filed a motion, in which Gale Norton ("Norton") joined, to dismiss the Complaint for lack of standing. (C.R. 11, 16). The motion was granted by Memorandum Decision and Order (C.R. 26) and Judgment (C.R. 27), dated April 14, 2004, ruling that ACP's interest in consideration of an economically and environmentally superior alternative is not a basis for standing to challenge refusal to consider alternatives. The district court denied ACP's motion for reconsideration on June 30, 2004 (C.R. 33). The Ninth Circuit Court of Appeals affirmed August 22, 2005, and denied a Petition for Rehearing En Banc October 28, 2005.

STATEMENT OF FACTS

As the matter was submitted on defendants' (Agrium/Norton's) Motion to Dismiss, the facts, as set out in the Complaint, were established as follows:

1. Defendant Agrium owns a phosphate fertilizer plant at Conda, Idaho. C.R.1, ¶ 15.

2. The plant was established in the distant past at Conda because southeast Idaho then contained substantial

available phosphate reserves, and because Conda is served by rail, making in-shipment of supplies, notably sulphur, and out-shipment of product, economical. C.R.1, ¶¶ 15,16.

3. Since then, Idaho phosphate reserves have become depleted. Further, Idaho reserves have been found to contain environmentally dangerous levels of selenium. Nevertheless, it is said to be uneconomical to abandon the Conda plant and build another plant where satisfactory ore may be more available. C.R.1, ¶ 16.

4. The nearest commercially viable, extensive, unexploited phosphate reserves are in northeast Utah, near Vernal. Part of the Vernal Field is controlled by J.R. Simplot Co. ("Simplot") as successor of Chevron, U.S.A. ("Chevron"). The remainder is controlled by plaintiff ACP under leases from the State of Utah. The Vernal reserves do not contain the problematical selenium constituency of Idaho reserves. C.R.1, ¶¶ 12, 17, 18.

5. Large-scale development of the Vernal reserves began in 1986, when developing technology first permitted construction of a common carrier phosphate slurry pipeline connecting the Vernal field to the railhead at Rock Springs, Wyoming. The pipeline, constructed and operated by Chevron (1986-1990), was purchased in 1990 and is presently operated by Simplot. C.R.1, ¶¶ 18, 20.

6. A substantial part of phosphate ore mined in the West for fertilizer is now mined at Vernal, which supplies a major new fertilizer plant at Rock Springs, Wyoming,

and to a lesser degree, an older plant at Pocatello, Idaho. C.R.1, ¶ 18.

7. The Rock Springs and Pocatello plants belong to Simplot and, together with the Agrium Conda plant, constitute the only three phosphate fertilizer plants in the West. C.R.1, ¶¶ 17, 18.

8. To be economically viable, fertilizer plants in the West must obtain ore supply from Idaho, or from Vernal. Conversely, phosphate mined in the West for fertilizer must presently be sold to the Conda plant, the Pocatello plant, or the Rock Springs plant. C.R.1, ¶¶ 16, 17, 18.

9. The Ashley Creek Vernal leases have been fully explored and tested, and have been shown to be in all respects comparable to the Simplot Vernal properties. Costs of production from these properties are therefore estimated to be comparable. Pending construction of a new phosphate fertilizer plant in the West, the most predictable market for use of Ashley Creek ore in fertilizer is the Agrium Conda plant. C.R.1, ¶¶ 19, 20.

10. Prior to 1988, Agrium, operating under the name Cominco, purchased ore for a Canadian plant from the present Simplot reserves at Vernal, and is familiar with this supply and its cost circa 1988. C.R.1, ¶ 18.

11. By 2000, the Conda plant had nearly exhausted its most recently developed short-term supply of phosphate ore, the mine at Central Rasmussen Ridge near Conda. Agrium contacted plaintiff to pursue supply for the Conda plant from Vernal. This proposal followed

a 1986 ruling of the Interstate Commerce Commission ("ICC") requiring that the common carrier pipeline from Vernal to Rock Springs provide reasonable rates for plaintiff, and correction, in 1999, of tariffs which the Surface Transportation Board ("STB"), in 1996, had found to have been excessive and illegal from 1986 to 1996. C.R.1, ¶¶ 20, 21.

12. Full information was provided Agrium regarding the Vernal ore. It was concluded that the ACP properties could provide the Conda plant at least a fifty year supply of satisfactory ore. C.R.1, ¶ 22.

13. However, without explanation why Vernal ore in 2000 should cost substantially more than Agrium had paid for it in 1988, and indeed, without explanation at all, Agrium disputed plaintiff's suggested price for Vernal ore, asserting that the cost as of 2000 would exceed the price paid in 1988 by a multiple of more than two. C.R.1, ¶¶ 23, 24.

14. Agrium then broke off negotiations with plaintiff, declaring that Agrium lacked financing to participate in the development of the Vernal leases. C.R.1, ¶ 14.

15. Agrium then pursued supply for the Conda plant by applying to the BLM for mining at North Rasmussen Ridge. Defendant Norton determined that as the proposal sought major federal action significantly affecting the human environment, an EIS was due. C.R.1, ¶ 25.

16. At the appropriate time in the EIS process, plaintiff advised BLM that obtaining supply for the

Conda plant from the Vernal leases appeared to be not only a lower cost alternative for Agrium, but one which did not threaten the selenium pollution anticipated at North Rasmussen Ridge. C.R.1, ¶ 29.

17. BLM declined to consider the Vernal leases as an alternative source of supply for the Conda plant stating the following reasons:

> a. BLM was not required to consider other options than North Rasmussen Ridge;
> b. BLM was not responsible to examine the comparative economics of potential alternatives;
> c. Agrium had already considered and rejected Vernal and BLM was bound by Agrium's choice; and
> d. At the end of the EIS process in 2003, with a BLM permit in hand, Agrium could develop supply from North Rasmussen Ridge sooner than from Vernal, and between 2000 and 2003 Agrium had exhausted its prior supply.

C.R.1, ¶ 31.

JURISDICTION BELOW

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332 and 1346. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1391.

ARGUMENT

The Ninth Circuit's holding that standing of a plaintiff, who asserts that a completed EIS is inadequate